Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-159

RICHARD RALPH RILEY,

Petitioner,

vs.

STATE OF NEVADA,

Respondent.

Petition for a Writ of Certiorari to the Nevada Supreme Court.

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RICHARD RALPH RILEY,

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STATE OF NEVADA,

Respondent.

Petition for a Writ of Certiorari to the Nevada Supreme Court.

Jerry J. Kaufman, attorney for Petitioner, Richard Ralph Riley, prays that a writ of certiorari issue to review the judgment and opinion of the Nevada Supreme Court entered in the above case on March 27, 1975, and its order denying rehearing entered on April 30, 1975.

Opinions of the Courts Below.

The Petitioner, Richard Ralph Riley, was convicted in the District Court of Nevada, Eighth Judicial District, on a three-count information, charging violations of N.R.S. 200.130 (First degree kidnapping), N.R.S. 200.363 (Rape), and N.R.S. 201.190 (Infamous Crime against Nature). Five-year sentences as to the first two infractions, and life imprisonment with possibility of parole as to the last, running concurrently, were rendered by the District Court and such conviction and sentencing were appealed to the Nevada Supreme Court.

The opinion of the Nevada Supreme Court is reported at 91 Nev. 64.

Jurisdiction.

The judgment and opinion of the Nevada Supreme Court was entered on March 27, 1975, and a copy thereof is appended to this Petition in the Appendix as Exhibit "A". A timely Petition for Rehearing was denied on April 30, 1975, and a copy thereof is appended to this Petition in the Appendix as Exhibit "B". This Petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

Questions Presented.

1. The Nevada Supreme Court should have reversed the District Court's judgment on the basis of that Court's Master Calendar Judge denying Appellant his due process by allowing the Appellant to unknowingly make a withdrawal of his guilty plea to the charge of Rape which had been entered pursuant to negotiations with the District Attorney's Office whereby the charges of Infamous Crime against Nature, Robbery and First Degree Kidnapping were to be dismissed upon Appellant's pleading guilty to Rape.

2. The trial counsel failed to intelligently and thoroughly apprise the Appellant of the elements required to be proven, the nature of the offenses, and most importantly the penalties for those crimes the Appellant would stand trial upon, thereby depriving him of both his right to have effective counsel as guaranteed by the Sixth Amendment and his due process.

3. The Nevada Supreme Court deprived Appellant of his due process by failing to consider whether Appellant had received the assistance of effective counsel.

Statutory Provisions Involved.

1. U.S. Constitution, Fourteenth Amendment.

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process.

2. U.S. Constitution, Sixth Amendment.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against them; to have compulsory process for obtaining witness in his favor, and to have the assistance of counsel for his defense.

How Federal Questions Were Raised.

The issue of Appellant having been denied his due process as a result of the District Court Judge allowing him to make an unknowing withdrawal of his plea of guilty was first raised before the Nevada Supreme Court. The issue was first presented at the trial (f. 074, 081) and raised in Appellant's Opening Brief, pages 18-23. The Court ruled that reversal could not be granted on this ground.

The issue of Appellant being deprived of his due process, and his right to effective counsel as guaranteed by the Sixth Amendment was first raised before the Nevada Supreme Court. This issue was first presented

in the Appellant's Opening Brief, page 22. It was the sole topic of discussion in Appellant's Reply Brief (since counsel below could not raise the question of his own ineffectiveness).

The Nevada Supreme Court never even considered the issue of defendant being represented by ineffective counsel as a ground for reversal, thereby denying him the opportunity to have all his defenses considered as guaranteed by the Fourteenth Amendment.

Statement of the Case.

This case concerns the conviction of Richard Ralph Riley on the charges of infamous crime against nature, robbery and first degree kidnapping. It was alleged that Appellant forcefully abducted Armenta Reinoehl on the morning of June 1, 1972, and subsequently forced her to perform oral copulation upon him. It is then alleged he raped and robbed her. All of the preceding events occurred with only minor harm resulting to the victim. Appellant appealed to the Nevada Supreme Court, urging that he was denied due process as a result of the District Court Judge allowing him to withdraw his plea of guilty to rape without informing him that a conviction for infamous crime against nature carried with it a mandatory life sentence with possibility of parole.

As to this contention, the Nevada Supreme Court ruled against Appellant. Appellant also urged in both his opening and reply briefs that he was denied both his due process, and Sixth Amendment right as a result of being represented by ineffective counsel. The Nevada Supreme Court did not even consider this issue thereby depriving him of his right to have all his defenses heard.

REASONS FOR THE WRIT.

The Decision of the Nevada Supreme Court Not Granting a Reversal of the Trial Court's Judgment on the Basis of Appellant Having Ineffective Counsel Is in Conflict With Other U.S. Supreme Court Decisions.

In *Kott v. Green,* 303 F. Supp. 821 (1968), the Court stated in relevant part:

> "Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then offer his informed opinion as to what plea should be entered."

See *Von Molke v. Gillis,* 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948).

The Sixth Amendment to the U.S. Constitution not only guarantees timely and operative counsel, but also a right to assistance of counsel whose quality of performance does not fall below a certain level. See *Powell v. Alabama,* 287 U.S. 45 (1932). In the instant case Appellant's previous counsel failed to inform him that rape was a non-probationary offense; counsel also did not inform Appellant that a conviction on the count of infamous crime against nature would result in a mandatory life sentence. Therefore by not reversing, the Supreme Court of Nevada denied Appellant his Sixth Amendment rights and his due process under the Fourteenth Amendment.

Importance of Granting the Writ of Certiorari on the Basis of Appellant Being Deprived of His Due Process and Sixth Amendment Rights Due to Him Being Represented by Ineffective Counsel.

The failure to recognize that a defendant has a guaranteed right to competent counsel under the Sixth Amendment would contribute to many miscarriages of justice. In this particular case, a man who would have been sentenced to five years in prison had he been informed of the possible consequences of withdrawing his guilty plea to rape, is now in the Nevada State Prison serving a life sentence.

However, the repercussions of the ruling of this case extend far beyond it. Our criminal justice system is based on having two competent counsel and a competent judge and, if needed, jurors, who working together deliver a just verdict. If any one of these people is incompetent, the scales become unbalanced and justice is not delivered.

The fact that the Appellant was represented by counsel is not enough to insure a just determination of his guilt or innocence. What should be required is representation by counsel who can adequately defend him. Whatever standards may be set, the failure of counsel to inform Appellant that rape was non-probationary offense and that a conviction of infamous crime against nature was punishable by a mandatory sentence of life imprisonment would constitute inadequacy of counsel.

Failure by the Nevada Supreme Court to Consider Appellant's Ground for Reversal That Was Based on Ineffective Counsel Denied Him His Due Process as Guaranteed Under the Fourteenth Amendment.

Nevada Revised Statute 177.015(1)(b) gives a criminal defendant the right to appeal to the Nevada Supreme Court from a ruling by the District Court denying a motion for new trial. This right is valueless if, as was done in this case, the Supreme Court does not consider one of the grounds Appellant raises in his brief.

In *Maher and Tousignant v. S. T. Swift,* 14 Nev. 324, 332 (1879), the court stated in relevant part: ". . . we are only called upon to dispose of such questions as are assigned as error by appellant. . . ." (See also *Leonard v. Bowler,* 72 Nev. 166, 171 [1956].)

In the instant case, Appellant raised the issue of ineffective counsel, however, the Nevada Supreme Court failed to consider it as a ground for reversal.

Importance of Granting the Writ of Certiorari on the Basis of Nevada Supreme Court Not Hearing and Deciding Upon Appellant's Ground for Reversal Based on Ineffective Counsel Extends Far Beyond This Particular Case.

An appellant is entitled to have all his defenses that are properly raised on appeal to be heard and decided by the Court. To allow a Court to indiscriminately choose to concern itself with only certain defenses is a blatant denial of due process. In order to insure that justice has been carried out, all defenses of a defendant

must be considered and ruled upon. If they are not considered, as in this case, justice has not been rendered.

To allow this case to stand would be support an infringement upon a person's constitutional right to due process. This would set a dangerous precedent.

The Decision of the Supreme Court Denying Appellant's Request for a Reversal of the Trial Court's Decision Based on the Trial Court Judge Allowing the Appellant to Make an Unknowing Withdrawal of His Guilty Plea to Rape Is in Conflict With Federal Court Decisions.

The Court in *Frederick James Caster v. United States of America,* 319 F.2d 850, stated in relevant part: "Mistakes of counsel are not grounds for relief unless the proceedings were a mockery or resulted in the deprivation of constitutional rights." The District Court judge in the instant case knew that Appellant had not been properly apprised of the penalties for the charge of rape filed against him since the Appellant told the Court that his attorney had told him prior to his entering his plea that there was a possibility of parole on the rape charge (f. 081, D. Ct. record). Therefore, the District Court judge should have assumed the Appellant was not apprised of the penalty for infamous crime against nature and informed Appellant of the possible penalty. By the judge not apprising the Appellant of the penalty for infamous crime against nature, either through neglect or inadvertence, but nevertheless failing to apprise him, Appellant was deprived of his right to due process as guaranteed by the Fourteenth Amendment and as a result of this deprivation the trial became a mockery against justice.

The defendant in a criminal action must look to the judge to assure he is not being deprived of his due process if his counsel has been ineffective in protecting those rights.

Importance of Granting Writ of Certiorari on Behalf of Appellant Being Deprived of Due Process as a Result of Trial Judge Allowing Him to Unknowingly Withdraw Plea of Guilty to Rape.

A criminal defendant should not be subjected to a harsher sentence because of neglect on the part of those persons who are designated to assure he is not deprived of his due process. To allow this case to stand would set a dangerous precedent for neglect on the part of counsel and judge.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

JERRY J. KAUFMAN,
Attorney for Petitioner.

EXHIBIT "A".

Opinion of the Supreme Court of the State of Nevada.

In the Supreme Court of the State of Nevada.

Richard Ralph Riley, Appellant, vs. The State of Nevada, Respondent. No. 7585.

Filed: March 27, 1975.

Appeal from judgment of the Eighth Judicial District Court, Clark County; Carl J. Christensen, Judge.

Affirmed.

Jerry J. Kaufman, of Las Vegas, for Appellant.

Robert List, Attorney General; George Holt, District Attorney, and Sherman H. Simmons, Deputy District Attorney, Clark County, Las Vegas, for Respondent.

OPINION

Per Curiam:

A jury found appellant, Richard Ralph Riley, guilty of rape, the infamous crime against nature, and robbery. He seeks reversal of his judgment of conviction on two principal grounds: 1) Prosecutorial misconduct committed during his trial and 2) the failure of the chief judge properly to advise Riley of his constitutional rights when the judge granted Riley's motion to withdraw a guilty plea to the charge of rape that he had previously entered.

1. Riley followed the victim of his crimes in his car as she was driving home after work. As she left her car, Riley accosted her with a pistol and then ordered her into her vehicle. At gun point, she drove him to another location, where he had her disrobe. Over the victim's pleading protests that she was a married woman

and had children, Riley at the point of his gun forced the victim to commit the infamous crime against nature, *i.e.*, oral copulation, for "about five minutes."

Not having fully gratified his lust, Riley then proceeded to rape the woman for about 15 minutes, although, because he was on "speed", he was unable to reach a climax. He then returned the victim's clothes and released her, after taking $60 from her purse.

We have reviewed the record of the proceedings below. The evidence is clear and convincing beyond a reasonable doubt that Riley committed the crimes of which he was found guilty. The victim's testimony is corroborated by an officer of the Las Vegas Metro Police Department who arrested Riley. The arrest was based on the description provided by the victim of Riley, his vehicle, and the contents thereof.

2. We have reviewed and considered the prosecutorial misconduct of which Riley complains. For the most part it consists of gratuitous remarks relating to the trial judge's rulings made during trial and the prosecutor's argument to the jury. While these remarks were unnecessary, we do not find that they constitute grounds for reversible error. Improper argument is assumed to be injurious, but if the case is free from doubt, a reversal will not result. Pacheco v. State, 82 Nev. 172, 414 P.2d 100 (1966).

The record below leaves no doubt as to Riley's guilt. Indeed, Riley testified before the jury regarding the facts surrounding the commission of the infamous crime against nature and the robbery, but he claimed that he was unable to consummate the rape because of his temporary impotency. The evidence pointing to the guilt of Riley was overwhelming. Additionally, the trial

judge properly instructed the jury that they and they alone were the sole judges of the facts in the case.[1] Therefore, under the posture of this case we do not find the necessary grounds for reversible error.

3. Riley contends that the chief judge erred in allowing him to withdraw his plea of guilty to the rape charge. The authorities he cites pertain solely to the *entry* of a plea of guilty, *i.e.*, whether such plea was voluntarily and knowingly made. No similar determination is required prior to allowing the withdrawal of a guilty plea.[2]

Finding no grounds to reverse the jury's verdict of guilty, we affirm Riley's judgment of conviction.

/s/ Gunderson, *C. J.*
Gunderson
/s/ Batjer, *J.*
Batjer
/s/ Zenoff, *J.*
Zenoff
/s/ Mowbray, *J.*
Mowbray
/s/ Thompson, *J.*
Thompson

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[1]Also, the prosecutor prefaced his remarks to the jury as follows:

"I should forewarn you that what we try to do in this argument is to put the bits and pieces of testimony into perspective. We try to tell you what our feeling and theory of this particular case is, but I would like to add this admonition, that what we say at this time is not evidence[;] only what comes from that chair is evidence and if I should make any misstatement of the testimony, as you recall it during the time that you listened to it, then disregard what I said. Remember what you yourself have heard. . . ."

[2]Apparently Riley had entered a plea to the rape charge as a result of plea negotiations. However, when he was permitted to

(This footnote is continued on next page)

EXHIBIT "B".

Order Denying Rehearing.

In the Supreme Court of the State of Nevada.

Richard Ralph Riley, Appellant, vs. The State of Nevada, Respondent. No. 7585.

Filed: April 30, 1975.

Rehearing denied.

/s/ Gunderson, *C. J.*
Gunderson

/s/ Batjer, *J*
Batjer

/s/ Zenoff, *J.*
Zenoff

/s/ Mowbray, *J.*
Mowbray

/s/ Thompson, *J.*
Thompson

cc: Hon. Robert List, Attorney General
Hon. George E. Holt, District Attorney
Jerry J. Kaufman, Chartered
Loretta Bowman, Clerk

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withdraw that plea the deputy district attorney made the following statement:

"For the record I would like to point out at this time that in the event the defendant is allowed to and chooses to withdraw his plea[,] negotiations have ceased; there will be no more, and we will go to trial on all charges."

Attest: A full, true and Correct Copy.
C. R. Davenport, Clerk of the Supreme Court
By /s/ Judith McCulloch, Deputy.